IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ELAINE M.,	)	
	)	2 CA-JV 2007-0100
Appellant,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
ARIZONA DEPARTMENT OF ECONOMIC SECURITY and ISAIAH M.,	)	Rule 28, Rules of Civil Appellate Procedure
	)	
Appellees.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 12580600

Honorable Ted B. Borek, Judge

AFFIRMED

Curtis & Cunningham
By George Haskel Curtis
Tucson
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Terry Goddard, Arizona Attorney General
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Department of Economic Security

H O W A R D, Presiding Judge.

¶1 Elaine M., mother of Isaiah, born in 2006, appeals from the juvenile court's order terminating her parental rights to her son based on her mental illness or history of

chronic substance abuse and the length of time Isaiah spent in a court-ordered, out-of-home placement.[1] *See* A.R.S. § 8-533(B)(3) and (B)(8)(a). Elaine purports to challenge the court's best interests determination, "particularly in light of the denial of the court to place Isaiah with his maternal grandparents." However, Elaine's argument focuses entirely on the court's denial of her motion to place Isaiah with his maternal grandparents (grandparents), rather than the termination of her parental rights. For the reasons set forth below, we affirm.

¶2 A juvenile court may terminate a parent's rights if it finds by clear and convincing evidence that any statutory ground for severance exists and if it finds by a preponderance of the evidence that severance is in the child's best interests. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). On review, "we will accept the juvenile court's findings of fact unless no reasonable evidence supports those findings, and we will affirm a severance order unless it is clearly erroneous." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002).

¶3 We view the evidence in the light most favorable to upholding the juvenile court's ruling. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 20, 995 P.2d 682, 686 (2000). Isaiah was a "medically fragile infant." In June 2006, when Isaiah was one month old, the Arizona Department of Economic Security (ADES) filed a reactivated dependency petition alleging the following: Elaine's rights had been terminated as to her

[1]Isaiah's father, whose parental rights were also terminated, is not a party to this appeal.

two oldest children in 2004, and one of her other children had been placed with the grandparents, who were appointed permanent guardians;[2] she had not remedied the circumstances leading to the termination and permanent guardianship of her other children; she was still involved with Isaiah's father, with whom she had a history of domestic violence and who was a registered sex offender; and she suffered from mental and behavioral issues that could impact her ability to care for and protect Isaiah.

¶4 The juvenile court adjudicated Isaiah dependent as to both parents in September 2006. ADES provided various services to the parents, the appropriateness of which Elaine does not challenge on appeal. A January 2007 home study recommended temporarily placing Isaiah with the grandparents. At a permanency planning hearing in June 2007, the court changed the case plan to severance and adoption, and ADES filed a motion to terminate both parents' rights, citing as grounds, inter alia, Elaine's mental illness or history of chronic substance abuse and Isaiah's having been out of the home for nine months or longer pursuant to § 8-533(B)(3) and (B)(8)(a).

¶5 In August 2007, almost two months after the motion to terminate had been filed, Elaine filed a motion to place Isaiah with the grandparents, stating she "might" relinquish her parental rights if the motion were to be granted. In September 2007, on the first day of the contested severance hearing, the parties stipulated to the admission of the state's exhibits in lieu of testimony and agreed the juvenile court would rule on the

[2]Although not reflected in the dependency petition, the record shows that four of Isaiah's siblings were the subject of prior dependency proceedings.

severance motion after addressing Elaine's motion for placement of Isaiah with the grandparents. Following three hearings, at which various witnesses testified, the court denied Elaine's motion to place Isaiah with the grandparents in November 2007. The court severed both parents' rights two days later.

¶6 For two reasons, Elaine lacks standing to challenge the juvenile court's refusal to place Isaiah with his grandparents. First, her notice of appeal states she is only appealing the court's termination of her parental rights, which did not include the court's initial denial of Elaine's placement motion. Additionally, Elaine did not file a direct appeal from the juvenile court's November 15, 2007, signed order initially denying the placement motion, the only manner by which she could have directly challenged that ruling. *See Lindsey M. v. Ariz. Dep't of Econ. Sec.*, 212 Ariz. 43, ¶ 9, 127 P.3d 59, 61-62 (App. 2006) (order ratifying or changing child's placement during dependency is final and appealable order). Nor did she ask the court to stay its subsequent termination order so she could do so.

¶7 Second, because, as we stated, in her opening brief she is not truly challenging the court's termination of her rights, she has no remaining right to oppose Isaiah's temporary physical placement. As a parent whose rights were severed precisely because it was *not* in Isaiah's best interests to continue the parental relationship, Elaine does not have the legal capacity to assert an argument regarding those very interests. *See* A.R.S. § 8-539 (order terminating parent-child relationship divests parent and child "of all legal rights, privileges, duties and obligations with respect to each other"); *Sands v. Sands*, 157 Ariz. 322, 324, 757 P.2d 126, 128 (App. 1988) (once order severing parental rights was issued, "father's

standing as a parent terminated"). Section 8-538, A.R.S., is consistent with our conclusion. The statute prescribes what must be included in a termination order. Once the court terminates a parent's rights, it must then determine whether it is in the child's best interests to place him temporarily "with a grandparent or another member of the child's extended family." § 8-538(B) and (C). The placement order is made after a parent's rights have been terminated and the parent no longer has a right to make any decisions relating to that child. Although the court here denied Elaine's placement motion before it terminated her parental rights, the denial was clearly in contemplation of the impending severance.

¶8 Even assuming arguendo that Elaine is actually challenging the juvenile court's finding that termination of her parental rights was in Isaiah's best interests and that she had made at least an arguable connection between the placement determination and Isaiah's best interests for purposes of § 8-533, there was overwhelming evidence to support that finding. The court was required to determine whether Isaiah would benefit from termination or whether he would be harmed if he remained in Elaine's care. *See Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, ¶ 19, 83 P.3d 43, 50 (App. 2004). In making its assessment, the court could consider the existence of a current adoptive plan or that Isaiah is adoptable. *See id*. In addition, the court was permitted to consider the fact that Isaiah's current foster placement met his needs. *See id*. The evidence showed that the court applied the proper legal standard not only when it determined that severance was in Isaiah's best interests, but also when it found that placing him with the grandparents was not.

¶9 At the severance hearing, the grandmother testified that, although adopting Isaiah would mean nine people[3] would be living in her three-bedroom mobile home, she nonetheless wanted to adopt him because she loved him. Neither grandparent works, and the family's sole source of income comes from adoption subsidies, assistance from ADES, and food stamps. Two of the adopted grandchildren also have special needs; one of them, Isaiah's brother, has anger issues and sometimes "hits the walls." The grandmother testified that sometimes she does not have enough money to buy gas for her car but that she would make other arrangements to take Isaiah to his medical appointments if that occurred. She described several safety hazards in the home, including holes in the floor and kitchen cabinets that were "falling off."

¶10 Isaiah's physician, Conrad Clemens, described Isaiah's medical condition and explained that he

> may have some issues with his gastrointestinal tract, his stooling and his development over the next couple of years . . . [and] that Isaiah needs to be in an environment like he has been with his foster mother that really maximizes stimulation and therapies and sort of allows him to blossom as best he can with a lot of attention.

Dr. Clemens opined that Isaiah will need "special attention," that he will require a "stab[le]" environment free from chaos, and that it is "critical" that he attend all of his medical appointments. He also explained that, based on the delayed growth of Isaiah's head, he is at risk for mental retardation and that children like Isaiah who are "placed in stimulating,

[3]Four of Isaiah's siblings live with the grandparents, along with another adopted grandchild, in addition to the grandparents' biological, teenage daughter.

excellent environments do better" than similar children who are not. Isaiah's foster mother, who was trained to work with "special needs" babies, explained that his diet must be carefully monitored in order to assure that his intestines work properly.

¶11 A parent aide who worked with the family described several safety issues in the grandparents' home, including beer cans in the yard, broken windows, holes in the floor, and kitchen cabinets that appeared to be falling apart. She also testified that she had observed a three-year-old grandchild serving herself hot food directly from the stove and a lack of adult intervention to allay fighting and screaming among the children. She stated that the grandmother's vehicle, a truck, could not accommodate all of the children's car seats and that the grandmother had told her she had been unable to take one of the children to his speech therapy appointment because there was no gas in the truck.

¶12 Isaiah's case manager testified that the grandparents had not only failed to address the safety issues in the home but they had not provided adequate supervision for the children. She told the court the family that had been providing respite care for Isaiah was interested in adopting him. Importantly, she testified that, although she believes the grandparents sincerely love Isaiah, she thinks they already have too many children to care for and that placement with the grandparents was not in Isaiah's best interests because they cannot provide a "stable," protective home for him, nor can they "be there" for him when he needs them.

¶13 During closing argument, ADES acknowledged that, although the home study report had recommended placing Isaiah with the grandparents, "we are saying that we are

opposing our own home study results and there is no other way to characterize it but that." Isaiah's attorney deferred to the court on the issue of placement, but the father and Elaine supported placement with the grandparents.

¶14 On the last day of the severance hearing, the court denied Elaine's motion for placement of the children with the grandparents in what it characterized as a "difficult" decision and explained in detail the grounds for its ruling:

> [Dr. Clemens] was very concerned about an environment to meet the potential for Isaiah and he feels strongly that Isaiah needs a[] place like the current foster home that can maximize stimulation and therapies for him.
>
> He expresses it is very important for Isaiah to attend all medical appointments and follow through.
>
> . . . .
>
> The grandfather can't drive and they have been told not to drive without insurance, so that is a concern, especially when you have someone who needs to get to doctor appointments.
>
> . . . .
>
> There is concern about the three bedroom home and the sleeping arrangements.
>
> . . . .
>
> It is particularly concerning that there have been holes in the floor and only one of them [has] been repaired based on the testimony and the grandmother admitted the danger of the cabinet.
>
> The State points out other testimony with regard to kids feeding themselves and using hot water from the stove demonstrates safety issues in the home . . . .

. . . .

> The grandfather . . . did not seem to acknowledge the special needs of [Isaiah's sibling whom the grandparents had adopted] so I would be concerned about him acknowledging the needs of Isaiah.
>
> . . . .
>
> [T]here was a beer in the yard and six or seven windows broken and after two months they were still broken.
>
> Under the circumstances . . . I find it's in the best interest of the child[] not to be placed with the maternal grandparents despite the presumption for that kind of placement . . . .

¶15 In its written ruling, which it issued two days after the last hearing, the court comprehensively summarized the facts and concluded, in part, as follows:

> Petitioner has produced a preponderance of evidence establishing that termination of the parental rights is in the child's best interest. A termination of these parental rights would further the plan of adoption. The child is in the least restrictive type of placement, consistent with the needs of the child[]. The child is residing in foster homes, and at least one known family has expressed interest in adopting him. It is not in the child's best interest to be placed with a grandparent or any other identified relative.

¶16 Elaine further contends the court failed to provide specific written findings as to why placement with the grandparents was not in Isaiah's best interests, as § 8-538(C) requires. The statute provides that if the court finds grounds for termination of parental rights and "[i]f the court finds that placement with a grandparent . . . is not in the child's best interests, the court shall make specific written findings in support of its decision." Although we previously concluded Elaine lacks standing to challenge the propriety of the court's

decision not to place Isaiah with the grandparents, she can challenge the legal sufficiency of the termination order. Because § 8-538 prescribes what all termination orders must contain, Elaine has standing to argue that the juvenile court did not satisfy all the requirements of the statute and that the termination order is, therefore, defective. Accordingly, we address her argument. However, because "[w]e generally do not consider objections raised for the first time on appeal . . . particularly . . . [objections] relate[d] to the alleged lack of detail in the juvenile court's findings," Elaine has waived this argument by having failed to raise it below. *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 21, 153 P.3d 1074, 1081 (App. 2007) (mother whose parental rights were severed waived right to raise on appeal whether juvenile court should have made more specific findings under § 8-538(A), as she did not object to findings below). Moreover, the transcript of the last day of the severance hearing, from which the court's reasoning is quoted at length in this decision, leaves no doubt why the court ruled as it did. Therefore, any error was harmless. *See id.* n.5.

¶17 Relying on A.R.S. §§ 8-514(B), 8-829(A)(4), and 8-845(A)(2), Elaine argues that the juvenile court ignored the statutory preference for placement with grandparents and that it incorrectly shifted the burden of proof to her regarding this issue. Because these arguments are based on the court's denial of the placement motion, an issue that, as we stated, Elaine lacks standing to raise, we decline to address them. For the same reason, we also decline to address Elaine's claim that the court improperly considered the grandparents' financial status in determining the best placement for Isaiah.

¶18 The record contains reasonable evidence to support the juvenile court's severance order, including its determination that severance was in Isaiah's best interests and that placement with the grandparents was not. Finding that the court's ruling was not clearly erroneous, we affirm the order terminating Elaine's parental rights to Isaiah and its denial of the motion to place Isaiah with the grandparents.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge